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AUTHORITIES CITED

677588—46——1

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 618

GOOD LUCK GLOVE COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying the Administrator's application for a preliminary injunction (R. 124) is reported in 52 F. Supp. 942. The opinion of the Circuit Court of Appeals affirming the order of the district court denying a preliminary injunction is reported in 143 F. 2d 579.

The district court rendered no opinion when it granted petitioner's motion for summary judg-

ment (R. 150). The opinion of the Circuit Court of Appeals reversing the judgment of the district court (R. 168) is reported in 150 F. 2d 853.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on August 3, 1945 (R. 170). A petition for rehearing was filed on August 17, 1945 (R. 170) and denied on September 11, 1945 (R. 170). The petition for a writ of certiorari was filed in this Court on November 20, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945.

QUESTION PRESENTED

Whether under the General Maximum Price Regulation, as amended by amendments 23 and 38, the maximum price at which a manufacturer of work gloves may sell certain models of such gloves is the highest price at which it actually delivered such models in March 1942, or its offering price for such models in March 1942, where the only deliveries of such models were made under contract made before March 1942.

STATUTES AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. IV, 901 et seq.,), hereinafter referred to as the Act, as amended by the Stabilization Act of 1942 (56 Stat. 765, 50 U. S. C. App., Supp. IV, 961

et seq.), the Stabilization Extension Act of 1944 (58 Stat. 632), the Stabilization Extension Act of 1945 (Public Law 108, 79th Cong. 1st Sess.), and the General Maximum Price Regulation (7 F. R. 3153), as amended by Amendment 23 (7 F. R. 6615) and Amendment 38 (7 F. R. 10155).

The Act (Section 2 (a)) authorizes the Administrator to establish, by regulation or order, such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act.

Section 205 (e) of the Act as originally enacted provided that anyone selling a commodity at a price in excess of that permitted by a regulation establishing maximum prices should be liable for three times the amount of the overcharge—to the buyer if the commodity were purchased for use or consumption other than in the course of trade or business, otherwise to the Administrator. As amended by the Stabilization Extension Act of 1944, the section provides that the seller's liability shall be restricted to the amount of the overcharge if he proves that the violation of the regulation was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation. By the express terms of the Stabilization Extension Act, this amendment is made applicable to pending actions.

The General Maximum Price Regulation was issued by the Price Administrator on April 28,

1942 (7 F. R. 3153). It establishes prices for all commodities not expressly excepted or subject to a different regulation. At all material times involved in this action work gloves were among the commodities subject to the Regulation.

The Regulation (Section 2) provides that the maximum price at which any seller may sell any commodity shall be (a) the highest price charged in March 1942 by the same seller for the same commodity; or (b) if he made no such charge in that month for the same commodity the highest price charged by the same seller for the similar commodity most nearly like it; or (c) if he made no such charge in that month either for the same commodity or a similar commodity, the highest price charged by the seller's closest competitor for the same commodity or the similar commodity most nearly like it. The Regulation then defines the term "highest price charged by a seller in March 1942" as meaning:

> (a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942 to a purchaser of the same class; or
>
> (b) If the seller made no such delivery or supplied no such service during March 1942, his highest offering price for delivery or supply during that month to the purchaser of the same class; or
>
> (c) If the seller made no such delivery or supplied no such service and had no

such offering price to a purchaser of the same class, the highest price charged by the seller during March 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers.

STATEMENT

This action was brought by the Price Administrator to restrain the petitioner from violating the General Maximum Price Regulation and Supplementary Regulation 14 as revised and amended (8 F. R. 4486, 9787)[1] and to recover statutory damages under Section 205 (e) of the Act because of alleged violations of those Regulations.

The Administrator applied for a preliminary injunction (R. 16). At the conclusion of the hearing on this application, the following facts were found by the district court (R. 124, 131–132):

Petitioner is a manufacturer of work gloves. It makes and sells 480 models of gloves. In March 1942 it issued a new price list for its products. The prices quoted on this list were higher than those shown on a price list which petitioner issued in December 1941 and higher than

[1] The provisions of the Supplementary Regulation are not pertinent to the determination of any question presented by the petition for certiorari.

those which petitioner had previously charged. The highest price at which petitioner actually delivered ten models of its gloves in March 1942 were prices which were less than those shown on its March 1942 price list. All deliveries of these models in March 1942 were made under contracts made before March 1942. After the General Maximum Price Regulation became effective, it sold the ten models in question at prices in excess of those at which it had actually delivered them in March 1942, namely, at the prices shown on its 1942 price list. At the time the sales were made the maximum prices at which the gloves could be sold were governed by the General Maximum Price Regulation.

On these facts, the district court held that petitioner had not violated the General Maximum Price Regulation and, therefore, denied the Administrator's application for an injunction (R. 133). 52 F. Supp. 942. On appeal, the Circuit Court of Appeals affirmed. 143 F. 2d 579.

Thereafter, petitioner moved for summary judgment on the second count of the complaint, in which the Administrator sought a recovery of statutory damages for alleged violations of the General Maximum Price Regulation (R. 3). The motion was heard on affidavits and the record of the proceedings on the application for a preliminary injunction.

The affidavit submitted by petitioner averred the facts set forth in the findings which the court made at the time it denied the application for a preliminary injunction (R. 5). The affidavit submitted by the Administrator showed that after the effective date of the General Maximum Price Regulation, petitioner had sold 115 models of gloves at prices higher than the prices at which it delivered the same models in March 1942 (R. 135–137). In rebuttal petitioner submitted an affidavit averring that after the effective date of the General Maximum Price Regulation petitioner had not sold any gloves at prices in excess of those shown on its March 1942 price list; that in cases where after the effective date of the General Maximum Price Regulation it sold any model at a price in excess of that at which it had delivered the model in March 1942, it had sold and delivered an identical or substantially equivalent model in March 1942 at the price quoted in the March 1942 price list (R. 148); and that petitioner had been unable to identify the models referred to in the affidavits submitted by the Administrator (R. 149).

The district court granted the motion for summary judgment (R. 150–151), presumably on the ground that the sale of a commodity at a price in excess of that at which the seller actually delivered the commodity in March 1942 but not in excess of the seller's offering price for the commodity in

that month did not violate the regulation where the only deliveries of the commodity made by the seller in March 1942 were made under contracts antedating that month (Cf. R. 169). Judgment was thereupon entered in favor of the petitioner (R. 152). From that judgment the Administrator appealed (R. 153).

While the appeal was pending, this Court decided *Bowles* v. *Seminole Rock and Sand Co.*, (325 U. S. 410) in which it held that under Maximum Price Regulation 188 (a regulation in all material respects identical to the General Maximum Price Regulation), the highest price at which a commodity was actually delivered in March 1942, whether under a contract antedating that month or otherwise, was the maximum price at which the seller could lawfully sell the commodity. On the authority of this Court's decision in that case the Circuit Court of Appeals reversed the judgment of the district court and remanded the case for further proceedings, saying (R. 169):

> The question here presented is whether the General Maximum Price Regulation establishes the maximum price of a commodity at the highest price at which it was actually delivered during March, 1942, if the only deliveries in that month were under contracts made before March, 1942. In our former opinion we held that it does not. On June 4, 1945, the Supreme Court held that it does. *Bowles, Administrator,* v. *Seminole Rock & Sand Co.*

ARGUMENT

The decision of the court below is clearly right. It is not in conflict with the decision of any other appellate court. Nor does it decide any important question of law which has not already been decided by this Court.

1. Contrary to petitioner's contention, the present case cannot be distinguished from *Bowles* v. *Seminole Rock & Sand Co., supra,* on the ground that a different regulation is involved. The applicable provisions, and the General Maximum Price Regulation, which is involved in this case, are, as the court below observed (R. 169), in all material respects identical to those of Maximum Price Regulation 188 which was involved in the *Seminole* case. Furthermore, as the Administrator said in the Statement of Considerations, which he filed with the Division of the Federal Register when he issued Maximum Price Regulation 188, and as this Court pointed out in footnote 8 to its opinion in the *Seminole* case, Maximum Price Regulation 188 established maximum prices "'at the identical level of the General Maximum Price Regulation' for articles dealt in during March, 1942."

2. The proviso[2] which petitioner seeks to invoke has no bearing on any of the issues of this

[2] As amended by Amendment 38 (7 F. R. 10155) to the General Maximum Price Regulation on December 4, 1942, the proviso reads as follows:

Provided however, that:

(1) if before April 1, 1942, the seller raised his prices

case. Subject to exceptions not here material, the General Maximum Price Regulation provides

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for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except that to whom he was bound to make delivery or supply during March 1942 pursuant to a firm commitment made before the price rise) and

(2) *If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers*, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942 shall be deemed to be:

(i) The seller's increased offering price to such class of purchasers for delivery or supply during March 1942, or

(ii) If the seller had no such increased offering price to that particular class of purchasers, the highest price charged during March 1942 to a purchaser of a different class, adjusted to reflect:

(a) The seller's customary differential in price between the two classes of purchasers; or

(b) If the seller had no such customary differential, the actual percentage differential in price between the two classes of purchasers which existed at the time the seller last entered into a commitment, or if he did not enter into such a commitment, last submitted an offering price, for delivery or supply to a purchaser of that particular class during March 1942. [Italics supplied.]

This proviso was added by Amendment 23 (7 F. R. 6615). A provision identical to this proviso as modified by Amendment 38 was added to Maximum Price Regulation 188 by Amendment 3 to that regulation (7 F. R. 10155). This Court held that it was irrelevant in the *Seminole* case (footnote 9).

that the maximum price which a seller may charge a purchaser of any class for any commodity is the highest price at which he delivered the same commodity in March 1942 to *a purchaser of the same class.* The proviso, on which petitioner relies, is a modification and liberalization of a provision designed to preserve as nearly as possible the normal price structure of sellers having two or more classes of purchasers, such as wholesalers, retailers, institutions or governmental agencies, to whom they ordinarily sold at different prices. The sole purpose of the proviso is to avoid the abnormal differentials in a seller's maximum prices to various classes of purchasers, which would otherwise result in cases where the seller in March 1942 made deliveries of a given commodity at an increased price to one or more classes of purchasers (e. g. wholesalers and jobbers), but because of preexisting contracts made deliveries of the commodity in that month to one or more other classes of purchasers (e. g. retailers and consumers) only at prices in effect before the increase.

As the plain language of the proviso unequivocally shows, two conditions must be satisfied before the proviso becomes operative: First, the seller must have raised his prices for a commodity before April 1, 1942; and secondly, *he must have made a delivery of that commodity during March* 1942 *to at least one class of purchasers at the increased price.* Assuming for the pur-

pose of argument that the first condition has been met, it is plain that the second has not. The petitioner did not make any delivery at the increased price to any class of purchasers in March 1942 of any of the several models of gloves which it is charged with having sold in violation of the regulation. In fact it did not make any delivery of any such models at the increased price in March 1942. To sustain petitioner's contention it would be necessary to strike from the proviso the words "(2) If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers."

Far from sustaining petitioner's contention, the press releases to which petitioner refers on page 13 of its brief show beyond question that the proviso has no application whatever in this case. Those releases were issued when the Administrator promulgated Amendments 23 and 38 to the General Maximum Price Regulation, both of which amendments pertain to the proviso.[3] The press release of August 20, 1942 which accompanied the issuance of amendment 23 reads in part as follows (R. 98):

> From the outset the General Regulation adopted as the primary pricing test the highest price for which a seller de-

[3] The amendments are set forth at length on pages 99 and 103, respectively, of the record.

> livered a commodity or supplied a service in March. *To avoid abnormal price differentials among ceiling prices to various classes of buyers, such as wholesalers or retailers, the regulation permitted a seller who in March inaugurated a general price rise and made deliveries at the increased price to at least one class of purchaser to apply the increase to other classes of purchasers by maintaining his customary price differentials between various classes of buyers.* [Italics supplied.]
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> The amendment liberalizes this provision to permit similar adjustment in these situations: (1) where a seller raised his prices before, as well as during, March 1942; (2) where a seller can establish the fact that he customarily had price differentials for various classes of buyers but cannot readily determine the amount of the differential, and (3) where a delivery was made after the price rise at a lower price under a previous contract.
>
> *As a safeguard against use of the provision where a price increase was used merely for bargaining purposes, the amendment requires that delivery or supply must have been made during March to at least one class of purchasers.* [Italics supplied.]

Likewise, the press release of December 5, 1942 which accompanied the issuance of Amendment 38 (R. 101–102), reads in part as follows:

> Hitherto the price-raise provision of these two regulations allowed a seller to

> apply his general price increase only to those classes of purchasers for whom the increase was announced before April 1 for delivery during March. Since there was no occasion for a seller to announce a price increase for delivery in March to customers under long-term contracts which did not expire in March, the price-raise provision was usually inapplicable to such customers.
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> The new provision permits a seller to increase ceilings for goods delivered to customers under contract in March if the seller (1) announced a general increase prior to April 1, (2) *delivered some goods at the higher price in March*, and (3) delivered no goods in March at less than the new higher prices to such customers, aside from deliveries under the contract. [Italics supplied.]

The Statement of Considerations which the Administrator filed with the Division of the Federal Register in accordance with Section 2 (a) of the Act when he issued Amendment 38 makes it even more clear that the proviso is irrelevant to any of the issues of this case because of petitioner's failure to make any delivery of any of the particular models of gloves involved in this case at the increased price in March 1942. The Statement reads in pertinent part as follows:

> Under the Amendment substantially the same conditions as those formerly pre-

scribed must be met before the seller may obtain the benefit of the provision:

1. He must, prior to April, 1942, have increased his prices for a commodity or service to all his classes of purchasers or to all his classes of purchasers except those to whom he was bound to deliver or supply during March 1942 pursuant to firm commitments entered into before the price rise.

2. *He must, during March 1942, have delivered the commodity or supplied the service at the increased price to at least one class of purchasers.* [Italics supplied.]

Nor is there any merit to the argument made on page 14 of petitioner's brief that all models of gloves are to be treated as one commodity and that since petitioner delivered some models in March 1942 at the increased price the proviso is applicable. The petitioner manufactured several hundred models of gloves which in March 1942 it delivered or offered for delivery at prices ranging from a dollar a dozen to over eight dollars a dozen. If petitioner's contention were sound petitioner would be entitled to sell any of its gloves at the highest price at which it delivered any model in 1942. It could raise at will the price of any model so long as the highest price at which it delivered its most expensive model was not exceeded. Similarly, a manufacturer of shoes who in March 1942 delivered several models of shoes at prices varying from $5 to $15 a pair would be free to sell all models at $15 a pair. The devastating effect

which this would have on the price control program is obvious. The very purpose of the General Maximum Price Regulation was to freeze prices at their March 1942 levels. That purpose will be completely frustrated if all models of a general type are to be treated as one commodity for the purpose of the regulation.

Moreover, the regulation itself draws a clear distinction between the *same* and *similar* commodities. Thus it provides that if no charge was made for the same commodity in March 1942, the maximum price of any given commodity is the highest price charged for "the similar commodity most nearly like it" in March 1942;[*] and that "one commodity shall be deemed similar to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line." Section 2. Some of petitioner's models of gloves may be similar to others but none of them is the same. For the purpose of the regulation each model is to be treated as a separate commodity. This is

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[*] Like Maximum Price Regulation 188 the General Maximum Price Regulation prescribes a series of mutually exclusive formulas to be applied in sequence for determining the maximum price of any article. Only if the same commodity was neither delivered nor offered for delivery by the seller in March 1942 may the highest price charged for a similar commodity in March 1942 be resorted to for the purpose of determining the maximum price of any commodity.

clear not only from the plain language of the regulation but also from the administrative interpretation which has been placed upon it from the very date on which the regulation was issued. In the explanatory bulletin which was issued concurrently with the regulation and to which this Court referred in the *Seminole* case, the following interpretaions, among others to the same effect, are given:

> 2. Where the same articles have been sold under different brand names at different prices, the retailer cannot sell the lower priced brand at the same price as the highest priced brand. Different brands are different articles.
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> * * * * *
>
> 8. A retailer sold five different style number dresses at $9.95 apiece. During March he raised the price on three of the most popular style numbers to $10.95 but sold and delivered only two of these three style numbers at a higher price of $10.95. Only those two style numbers may now be sold at $10.95. The maximum price of the other three style numbers is $9.95.

3. The district court did not, as petitioner contends, find that for each model of glove which petitioner delivered in March 1942 only at a price below that shown on its March 1942 price list, petitioner delivered in that month an

identical model at the price shown on that list. Petitioner asserts that the findings of the district court should be read with the district court's opinion (R. 129), and that when they are so read they include the finding which petitioner asserts the court made. It is obvious, however, that the statement as to the sale of "individual or equivalent" models in the opinion on which petitioner relies was not intended as a finding of fact. On the contrary, as the opinion of the Circuit Court of Appeals indicates (R. 169), it was made in the course of a discussion of a question of law, namely, when one commodity is to be deemed the same as another within the meaning of the regulation. Moreover, the only opinion rendered by the district court was filed at the time it denied the Administrator's application for an interlocutory injunction. At the hearing on that application, the Administrator, with a view to narrowing the issues, confined his proof to ten models of gloves. At the hearing on the motion for summary judgment, affidavits were submitted showing that after the effective date of the General Maximum Price Regulation, petitioner sold 115 models at prices in excess of the highest prices at which it had delivered those models in 1942 (although not in excess of the prices shown on petitioner's March 1942 price list). The district court made no finding whatever in respect to

these models, and the Circuit Court of Appeals was clearly right in holding that it had not done so.

Nor can petitioner draw any comfort from the allegation in the affidavit which it submitted in support of the motion for summary judgment to the effect "that for every lot number or description of glove not actually sold and delivered by the defendant during the month of March 1942, at the prices shown in the March 1942 price list, there was an identical or *substantially equivalent* glove sold and delivered by the defendant during March 1942, at the prices fixed in the March 1942 price list" [*Italics ours*] (R. 148). This allegation will not support the judgment. The regulation fixes the maximum price at which a seller may sell a commodity at the highest price at which the seller in March 1942 *delivered the same commodity*—not a substantially equivalent commodity. Moreover, whatever probative force the allegation would otherwise have had is completely destroyed by the succeeding paragraph of the same affidavit (R. 149) in which the affiant admits that he had no knowledge of, and could not identify, the 115 models which, according to the affidavits submitted by the Administrator, petitioner sold at prices in excess of those at which petitioner had actually delivered them in March 1942.

CONCLUSION

The decision of the court below is clearly right and no reason exists which would warrant its being reviewed by this Court.

Respectfully submitted.

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